

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

01 DEC 2003

Hearing: July 1, 2003

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Globe Food Equipment Co.

Serial No. 76231175

Thomas W. Flynn for Globe Food Equipment Co.

Jill C. Alt, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Simms, Hanak and Holtzman, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge.

Globe Food Equipment Co. (applicant) seeks to register
CHEFMATE in typed drawing form for "power operated,
commercial, food service machines, namely, meat slicers,
food mixers and food processors." The application was
filed on March 20, 2001 with a claimed first use date of
July 1992.

Citing Section 2(d) of the Trademark Act, the
Examining Attorney has refused registration on the basis

that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the identical mark CHEFMATE, previously registered in typed drawing form to the same entity for "kitchen utensils, namely, pots and pans" (Registration No. 1,168,433) and for "small electric appliances or apparatus for household and home kitchen use, namely, choppers, mixers, peelers, slicers and dicers" (Registration No. 2,156,071).

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. An oral hearing was held before this Board on July 1, 2003 at which applicant's counsel was present, but the Examining Attorney was not.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the mark, they are absolutely identical. Thus, the first Dupont "factor weighs heavily against applicant" because applicant's mark is absolutely

identical to the registered marks. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and the goods of the cited registrations, we note that because the marks are identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 922 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

Considering first applicant's goods (power operated commercial meat slicers, food mixers and food processors) and the goods of cited Registration No. 1,168,433 (pots and pans), we note at the outset that while applicant's goods are restricted to commercial food service machines, registrant's pots and pans are not restricted. In other words, the term "pots and pans" is broad enough to include both domestic pots and pans as well as commercial pots and pans. Thus, a commercial operator such as a restaurant could well encounter both applicant's commercial meat slicers, food mixers and food processors as well as registrant's pots and pans under the absolutely identical mark CHEFMATE.

In arguing that there is no likelihood of confusion, applicant contends that its customers are "knowledgeable and sophisticated." (Applicant's brief page 6).

Obviously, sophisticated consumers are more likely to notice differences in marks than are ordinary consumers. However, this argument does not apply in this case because applicant's mark CHEFMATE is absolutely identical to the registered mark CHEFMATE. The most sophisticated individuals in the world would be unable to notice any differences in identical marks because there simply are no differences. Thus, restaurant owners, which applicant acknowledges at page 6 of its brief are its primary customers, would have no way of knowing that CHEFMATE pots and pans (including commercial pots and pans) emanate from a different source than CHEFMATE meat slicers, food mixers and food processors.

At page 6 of its brief, applicant argues that there is no likelihood of confusion because its "products are complex, expensive machines whose purchase are [sic] negotiated by highly knowledgeable and highly sophisticated purchasing agents, who may indeed be purchasing multiple units for a chain of restaurants or other facilities for a purchase price of hundreds of thousands of dollars."

(Emphasis added). There are two problems with applicant's

argument. First, applicant has offered absolutely no evidence whatsoever showing that its actual commercial meat slicers, food mixers and food processors are sold only to sophisticated purchasing agents in lots involving hundreds of thousands of dollars. Indeed, applicant's use of the word "may" strongly suggests that in actuality its commercial meat slicers, food mixers and food processors are also sold to individual restaurants in lots involving sums considerably less than hundreds of thousands of dollars.

Second, and of far greater importance, is the fact that it is well settled that in Board proceedings, "the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the cited] registration rather than what the evidence shows the goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Applicant's chosen description of goods is broadly described as power operated commercial meat slicers, food mixers and food processors. It is this description of the goods on which we must base our likelihood of confusion analysis. Applicant's chosen description of goods does not

contain any restriction that said goods will be sold only to professional purchasing agents in lots costing hundreds of thousands of dollars.

In sum, we find that there exists a likelihood of confusion resulting from the contemporaneous use of CHEFMATE for power operated commercial meat slicers, food mixers and food processors and the identical mark CHEFMATE for all types of pots and pans, including pots and pan for use in commercial establishments such as restaurants, which are, as previously noted, applicant's primary customers.

Turning to a consideration of the contemporaneous use of applicant's mark CHEFMATE on power operated commercial meat slicers, food mixers and food processors and the identical mark CHEFMATE on, among other goods, household slicers, choppers, mixers and dicers (the goods of cited Registration No. 2,156,071), we likewise find that there exists a likelihood of confusion. To begin with, the Examining Attorney has made of record numerous third-party registrations showing that the same marks are registered for both commercial and household slicers and the like. Contrary to applicant's argument at the top of page 6 of its brief, these third-party registrations are some evidence that commercial and household slicers and the like are related goods. See In re Mucky Duck Mustard Co., 6

USPQ2d 1467 (TTAB 1988), aff'd as not citable precedent 88-1444 (Fed. Cir. November 14, 1988). Moreover, the Examining Attorney has made of record news articles showing that the same companies manufacture both commercial and domestic slicers and the like. This is additional evidence that commercial and household slicers and the like are related goods.

As previously noted earlier in this opinion, when the marks are identical as is the case here, their contemporaneous use can lead to the assumption that there is a common source "even when [the goods] or services are not competitive or intrinsically related." Shell Oil, 26 USPQ2d at 1689. Of course, when the marks are absolutely identical and the goods of the applicant and registrant are related, there is clearly a likelihood of confusion.

One final comment is in order. One of applicant's primary arguments is that applicant once owned Registration No. 1,814,342 for "slicers: namely, power-operated commercial meat slicers, and parts thereof." It was registered on December 23, 1993 and was allowed to co-exist with registrant's Registration No. 1,168,433 for pots and pans which issued earlier on September 8, 1981. Applicant states that it inadvertently allowed Registration No. 1,814,342 to be cancelled for failure to file a Section 8

affidavit. Applicant then goes on to note that registrant was able to obtain its second registration of CHEFMATE for household slicers and the like in 1998 despite the fact that applicant's now cancelled Registration No. 1,814,342 was in effect as of 1998.

While we are not unsympathetic to applicant's plight, the fact that one Examining Attorney allowed applicant to register CHEFMATE for commercial meat slicers despite registrant's existing registration of the identical mark CHEFMATE for pots and pans, and the additional fact that a second Examining Attorney allowed registrant to register CHEFMATE for household slicers despite applicant's then existing registration of CHEFMATE for commercial meat slicers are actions which are simply not binding upon this Board. It is well settled as a matter of law that "the PTO's allowance of such prior registrations does not bind the Board or this court." In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Decision: The refusal to register is affirmed as to each of the two cited registrations.